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BEFORE THE ARIZONA CORPORATION COMMISSION
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COMMISSIONERS

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2015 APR -3 P 1:26

AZ CORP COMMISSION
DOCKET CONTROL

IN THE MATTER OF:

CONCORDIA FINANCING COMPANY, LTD,
a/k/a "CONCORDIA FINANCE,"

ER FINANCIAL & ADVISORY SERVICES, LLC,

LANCE MICHAEL BERSCH, and

DAVID JOHN WANZEK and LINDA WANZEK,
husband and wife.

Respondents.

DOCKET NO. S-20906A-14-0063

Arizona Corporation Commission
DOCKETED

APR 03 2015

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ELEVENTH
PROCEDURAL ORDER
(Quashes Subpoenas)

BY THE COMMISSION:

On February 27, 2014, the Securities Division ("Division") of the Arizona Corporation Commission ("Commission") filed a Notice of Opportunity for Hearing Regarding Proposed Order to Cease and Desist, Order for Restitution, Order for Administrative Penalties, and Order for Other Affirmative Action ("Notice") against Concordia Financing Company, Ltd, a/k/a Concordia Finance ("Concordia"), ER Financial & Advisory Services, LLC ("ER"), Lance Michael Bersch, and David John Wanzek and Linda Wanzek, husband and wife (collectively "Respondents"), in which the Division alleged multiple violations of the Arizona Securities Act ("Act") in connection with the offer and sale of securities in the form of investment contracts and promissory notes within or from Arizona.

The spouse of David John Wanzek, Linda Wanzek ("Respondent Spouse"), is joined in the action pursuant to A.R.S. § 44-2031(C) solely for the purpose of determining the liability of the marital community.

The Respondents were duly served with copies of the Notice.

1 On March 6, 2014, Respondents ER, Lance Michael Bersch and David John Wanzek filed a
2 Request for Hearing. On March 14, 2014, Respondent Linda Wanzek filed a Request for Hearing.

3 On March 17, 2014, by Procedural Order, a pre-hearing conference was scheduled for April
4 10, 2014.

5 On March 26, 2014, Respondent Concordia filed a Request for Hearing.

6 On March 27, 2014, by Procedural Order, the pre-hearing conference scheduled for April 10,
7 2014, was affirmed, with notice issued to Respondent Concordia.

8 On April 4, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda
9 Wanzek (collectively the "ER Respondents") filed a Motion to Dismiss and Answer ("Motion").

10 On April 9, 2014, Respondent Concordia filed an Answer.

11 On April 10, 2014, at the pre-hearing conference, the parties appeared through counsel and
12 requested oral argument regarding the Motion to Dismiss. The parties further proposed a schedule
13 for filing motions prior to oral argument.

14 On April 15, 2014, by Procedural Order, oral argument and a status conference were
15 scheduled to commence on May 21, 2014. It was further ordered that Respondent Concordia shall
16 file any Motion to Dismiss by April 25, 2014, the Division shall file its Response to the Motions to
17 Dismiss by May 9, 2014, and the Respondents shall file any Reply by May 16, 2014.

18 On April 25, 2014, Respondent Concordia filed its Joinder to Motion to Dismiss of
19 Respondents ER Financial & Advisory Services, LLC, Lance Michael Bersh, David John Wanzek
20 and Linda Wanzek.

21 On May 5, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda
22 Wanzek filed Acknowledgments of Possible Conflicts.

23 On May 9, 2014, the Division filed its Response to Motion to Dismiss by All Respondents
24 ("Response").

25 On May 16, 2014, Respondents ER, Lance Michael Bersch, David John Wanzek, and Linda
26 Wanzek filed their Reply in Support of Motion to Dismiss ("Reply").

27 On May 21, 2014, oral argument and a status conference were held. The parties appeared
28 through counsel and oral argument was presented. The Motion was taken under advisement and a

1 schedule was proposed for the parties to submit supplemental citations.

2 On May 22, 2014, the Division filed its Supplemental Citation of Authorities.

3 On May 29, 2014, Respondents Concordia, ER, Lance Michael Bersch, David John Wanzek,
4 and Linda Wanzek filed their Joint Supplemental Citation of Authorities.

5 On August 13, 2014, by Procedural Order, it was found that the Respondents had not
6 established dismissal to be appropriate and that it was necessary and proper to proceed with the
7 Respondents' request for a hearing. Accordingly, a prehearing conference was scheduled on
8 September 2, 2014.

9 On September 2, 2014, a pre-hearing conference was held. The parties appeared through
10 counsel. The scheduling of a hearing was discussed. Counsel for the ER Respondents stated they
11 would be filing a special action regarding the motion to dismiss. Counsel for the ER Respondents
12 requested that part of the hearing be held in the Lake Havasu area to accommodate witnesses for the
13 ER Respondents. This request was denied. After much discussion, a commencement date for the
14 hearing was agreed to by the parties.

15 On September 2, 2014, by Procedural Order, a hearing was scheduled to commence on May
16 11, 2015.

17 On January 5, 2015, the Division filed a Motion to Quash Discovery Demands by the ER
18 Respondents. The Division asserted that on November 24, 2014, the Division was served by the ER
19 Respondents with a "First Request for Production of Documents," a "First Set of Non-Uniform
20 Interrogatories," a "First Set of Requests for Admissions," a "Notice of 30(b)(6) Deposition," and a
21 "Notice of Deposition of Gary R. Clapper." The Division contended that the discovery demands by
22 the ER Respondents should be quashed because: discovery in this proceeding is governed by the
23 Administrative Procedure Act and the Commission's Rules, not the Arizona Rules of Civil
24 Procedure; the ER Respondents have not demonstrated a reasonable need for the information they
25 demand; the discovery demands include information and documents that are privileged and/or made
26 confidential by statute; and the discovery demands are unreasonably overbroad, unduly burdensome
27 and oppressive.

28 ...

1 On January 26, 2015, by Procedural Order, the Division's Motion to Quash Discovery
2 Demands was granted. In light of the ER Respondents' efforts to obtain discovery, the parties'
3 exchange of witness lists and copies of exhibits was accelerated.

4 Later that day, the ER Respondents filed a Response to the Division's Motion to Quash. The
5 ER Respondents contended that: the Commission's Rules allow for broad discovery; discovery is not
6 barred by either the Administrative Procedure Act or statutory confidentiality; the ER Respondents
7 have a reasonable need for, and a constitutional right to, discovery; the requested documents are not
8 privileged or work product; and the discovery is not burdensome. The ER Respondents also
9 requested oral argument on the matter.

10 On January 27, 2015, by Procedural Order, oral argument was scheduled to be held on
11 February 11, 2015. Later that day, the Division filed a Notice of Intent to File Reply in Support of
12 Motion to Quash Discovery Demands by the ER Respondents.

13 On February 3, 2015, the Division filed its Reply in Support of Motion to Quash Discovery
14 Demands by the ER Respondents. The Division argued that: the ER Respondents have not properly
15 sought discovery as provided under the Administrative Procedure Act and the Commission's rules;
16 the Arizona Rules of Civil Procedure do not apply to discovery in this proceeding; prior procedural
17 orders and Commission decisions cited by the ER Respondents can be distinguished or otherwise fail
18 to support ordering the discovery sought; the ER Respondents have not demonstrated a reasonable
19 need for the discovery sought; many of the documents sought are protected work product; and the
20 discovery sought is confidential under A.R.S. § 44-2042(A).

21 On February 5, 2015, the Division filed a Notice of Errata Regarding its Reply in Support of
22 Motion to Quash Discovery Demands by the ER Respondents.

23 On February 10, 2015, ER Respondents filed a Motion to Compel seeking discovery from
24 Respondent Concordia and requesting oral argument. The ER Respondents contend that the
25 Commission's rules allow broad discovery; their requests for production of documents are specific
26 and not overbroad or burdensome; Concordia is the custodian of its own records; and a subpoena is
27 not required as Concordia is a party to this proceeding. The ER Respondents further attached an
28 affidavit from Respondent David John Wanzek responding to Concordia's communicated demand for

1 a sworn statement as to the ER Respondents' claims that they returned files to Concordia and that Mr.
2 Bersch and Mr. Wanzek were privy to attorney-client communications between Concordia and its
3 counsel.

4 On that same day, counsel for ER Respondents filed a Notice of Change of Law Firm and
5 Notice of Association with Counsel.

6 On February 11, 2015, oral argument was held. The parties appeared through counsel. The
7 Division and the ER Respondents presented oral argument in favor of their respective positions on
8 the ER Respondents' requests for discovery. In light of the approaching commencement date of the
9 hearing, the presiding Administrative Law Judge ruled from the bench, finding that while the
10 Administrative Procedure Act applies, fairness dictates that in this case the Division more promptly
11 provide the Respondents with certain documents in its possession. Though the prior order quashing
12 the ER Respondents' discovery requests was affirmed, the Division was directed to disclose to the
13 Respondents, by February 26, 2015, the contracts it intends to submit as evidence of the 446 alleged
14 investments. The Division contended that it may not have contracts for all 446 of the alleged
15 investments and that the time required for redaction of this many documents might make it difficult
16 to meet the disclosure deadline. The Administrative Law Judge directed the Division to prioritize
17 those contracts involving the ER Respondents and permitted the Division to disclose by March 12,
18 2015, any contracts which, after a good faith effort, are not ready by February 26, 2015.
19 Additionally, the Division was directed to disclose the transcript from the examination under oath of
20 Respondent Lance Michael Bersch, and the exhibits used therein, by February 26, 2015. The
21 documents ordered to be disclosed by February 26, 2015, are all documents Division counsel stated
22 he planned to use at hearing and, therefore, would have been subject to disclosure by the March 12,
23 2015 scheduled exchange of exhibits and witness lists.

24 On February 13, 2015, by Procedural Order, the Division was directed to disclose documents
25 to the Respondents as set forth at by the Administrative Law Judge at oral argument on February 11,
26 2015.

27 On February 17, 2015, the ER Respondents filed an Application for Administrative Subpoena
28 requesting a subpoena for the deposition of anticipated Division witness Gary R. Clapper. The ER

1 Respondents also filed an Application for Administrative Subpoena requesting a subpoena for the
2 deposition of an Expert Accounting Witness to be designated by the Securities Division.

3 On March 6, 2015, the ER Respondents filed a Notice of Filing Affidavits of Service.

4 On March 9, 2015, by Procedural Order, a telephonic status conference was scheduled to
5 convene on March 16, 2015. The purpose of the status conference was to address whether the ER
6 Respondents continued to seek the production of further documents from Respondent Concordia in
7 light of the upcoming deadline for disclosure of exhibits and witness lists.

8 On March 11, 2015, Respondent Concordia filed its Motion to Extend Time to Exchange List
9 of Witnesses and Exhibits. Respondent Concordia requested an extension of the deadline to
10 exchange its List of Witnesses and Exhibits to March 20, 2015, based upon counsel for Concordia's
11 upcoming depositions and injunction hearings in matters unrelated to this case. In the motion,
12 counsel for Concordia noted that counsel for the ER Respondents had been contacted and would not
13 agree to an extension.

14 On March 12, 2015, the ER Respondents filed a Response in Opposition to Motion to Extend
15 Time to Exchange List of Witnesses and Exhibits. The ER Respondents opposed the motion for the
16 stated reasons that the hearing is imminent and the information is necessary for their defense.

17 Later on March 12, 2015, Respondent Concordia filed its List of Witnesses and Exhibits. The
18 ER Respondents also filed a Notice of Service of List of Witnesses and Exhibits.

19 On March 16, 2015, a telephonic status conference was held. The parties appeared through
20 counsel. The ER Respondents clarified which documents they continued to seek from Concordia.
21 Counsel for Concordia indicated the Respondents may be able to resolve the issue among themselves
22 within a couple weeks as Concordia needed time to prepare financial statements and ready board
23 minutes for disclosure. The Respondents agreed to work toward resolving the discovery issues raised
24 in the ER Respondents' Motion to Compel pending another status conference, and they further agreed
25 to include the Division in the discovery process.

26 It was further determined at the status conference that Concordia's Motion to Extend Time to
27 Exchange List of Witnesses and Exhibits had been rendered moot by Concordia's filing of a List of
28 Witnesses and Exhibits, though Concordia may supplement its exhibits and witness lists based upon

1 ongoing discovery. Also discussed was the Division's intent to amend the Notice of Opportunity to
2 include Linda Wanzek as a participant, as opposed to being joined solely for determining the liability
3 of the marital community. The Division agreed to file a motion to amend the Notice of Opportunity.
4 The Division also stated its intent to file a motion to quash the scheduled depositions of Gary Clapper
5 and an expert accounting witness. A schedule was determined for motion practice and oral argument
6 on the motion to quash.

7 On March 18, 2015, by Procedural Order, oral argument was scheduled for April 2, 2015, to
8 address the issue of the Division's motion to quash. A status conference regarding Concordia's
9 production of discovery was set for the same time.

10 On March 20, 2015, the Division filed a Motion to Quash Subpoenas, or in the Alternative,
11 Motion for a Procedural Order Limiting the Scope of Subpoenas. The Division contended that the
12 subpoenas should be quashed as they did not comply with the Administrative Procedure Act and the
13 Respondents now have the documents and information they claim they needed. In the alternative, the
14 Division argued that the scope of the depositions should be limited to only that information the ER
15 Respondents specifically identified in their Applications for Subpoenas.

16 On March 27, 2015, the ER Respondents filed a Response to the Securities Division's Motion
17 to Quash Subpoenas. The ER Respondents contended that the subpoenas complied with the
18 Commission's rules and the Administrative Procedure Act, that the ER Respondents have a
19 reasonable need for the depositions, and that the scope of the depositions should not be limited.

20 On that same day, the ER Respondents also filed a copy of a letter sent to counsel for the
21 Division. The letter was identified as an objection to the Division's investigative subpoenas for
22 Respondents David and Linda Wanzek. The ER Respondents noted that the Division has contended
23 in the past that an Administrative Law Judge lacks the power to quash an investigative subpoena.
24 However, the ER Respondents stated they filed a copy of the letter as a record of their objections.

25 On April 1, 2015, the Division filed its Reply in Support of Motion to Quash Subpoenas, or in
26 the Alternative, Motion for a Procedural Order Limiting the Scope of Subpoenas. The Division
27 argued that the subpoenas should be quashed because there is no finding in the record that the ER
28 Respondents have demonstrated a reasonable need for the deposition testimony, the applications for

1 subpoena were deficient and misleading as the ER Respondents have now identified additional
2 matters for discovery beyond those stated in the applications, and the ER Respondents have received
3 all the documents and information they claimed to need. In the alternative, the Division argued that
4 the scope of the subpoenas should be limited based upon: the matters for which the ER Respondents
5 have established a reasonable need pursuant to the Administrative Procedure Act; the Division's
6 deliberative process and attorney-client privileges; and the Securities Act's confidentiality statute,
7 A.R.S. § 44-2042(A).

8 On April 2, 2015, a status conference and oral argument were held. The parties appeared
9 through counsel. Counsel for the Respondents stated that Respondent Concordia is in the process of
10 preparing requested documents for disclosure to the ER Respondents. Respondent Concordia
11 asserted that some documents are likely in the possession of the Division, having been obtained from
12 the State of California following proceedings conducted there, and could be more easily obtained
13 from the Division. The Division asserted that the Securities Act's confidentiality statute applied, but
14 noted that it would make available supporting documentation used by the Division's accountant in
15 creating his Financial Data Summary.

16 The Division and the ER Respondents presented oral argument in favor of their respective
17 positions on the Division's Motion to Quash Subpoenas, or in the Alternative, Motion for a
18 Procedural Order Limiting the Scope of Subpoenas. Having considered the written and oral
19 arguments presented by the parties, as well as the statutes, rules and other authority cited therein, the
20 presiding Administrative Law Judge ruled from the bench and quashed the two subpoenas pursuant to
21 A.A.C. R14-3-109(O). The Administrative Law Judge found that the Administrative Procedure Act
22 applies and therefore, the ER Respondents must establish reasonable need for the information sought
23 in the depositions. In finding that the ER Respondents did not have reasonable need to proceed with
24 the depositions, the Administrative Law Judge noted: the numerous documents disclosed by the
25 Division as exhibits subsequent to the issuance of the subpoenas; the forthcoming disclosure by the
26 Division of the documents used by the accountant; the effect of these disclosed documents upon any
27 current reasonable need for the depositions regarding those six areas specifically identified in the ER
28 Respondents' Application for Subpoenas; and the schedule of the hearing, which will allow the ER

1 Respondents additional time before presenting their case, thereby overcoming any surprise that may
2 arise during the Division's presentation of its case in chief.

3 IT IS THEREFORE ORDERED that the Subpoena commanding Gary R. Clapper to
4 appear for a deposition on April 6, 2015, and the Subpoena commanding an Expert Accounting
5 Witness to appear for a deposition on April 7, 2015, are hereby quashed.

6 IT IS FURTHER ORDERED that the Division shall disclose to the Respondents, by April
7 15, 2015, the supporting documentation relied upon by the Division's accountant in creating his
8 Financial Data Summary.

9 IT IS FURTHER ORDERED that the Respondents shall continue to attempt to resolve
10 outstanding discovery issues arising from the ER Respondents' Motion to Compel.

11 IT IS FURTHER ORDERED that a hearing shall remain scheduled to commence on May
12 11, 2015, at 10:00 a.m., at the Commission's offices, 1200 West Washington Street, Hearing
13 Room No. 1, Phoenix, Arizona.

14 IT IS FURTHER ORDERED that the parties shall also set aside May 13-15, and 18-22,
15 2015, for additional days of hearing, if necessary.

16 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113-Unauthorized
17 Communications) is in effect and shall remain in effect until the Commission's Decision in this
18 matter is final and non-appealable.

19 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules
20 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission
21 *pro hac vice*.

22 IT IS FURTHER ORDERED that withdrawal or representation must be made in compliance
23 with A.A.C. R14-3-104(E) and Rule 1.16 of the Rules of Professional Conduct (under Rule 42 of the
24 Rules of the Arizona Supreme Court). Representation before the Commission includes appearances
25 at all hearings and procedural conferences, as well as all Open Meetings for which the matter is
26 scheduled for discussion, unless counsel has previously been granted permission to withdraw by the
27 Administrative Law Judge or the Commission.

28 ...

1 IT IS FURTHER ORDERED that the Presiding Administrative Law Judge may rescind, alter,
2 amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by
3 ruling at hearing.

4 DATED this 30th day of April, 2015.

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6 
7 MARK PRENY
8 ADMINISTRATIVE LAW JUDGE

9 Copies of the foregoing mailed/delivered
10 this 3 day of April, 2015, to:


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